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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL ENGINEERING &
CONTRACTING COMPANY, INC.,
Petitioner,

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR;
OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENT W. SEIFRIED *
POSTON, SEIFRIED & SCHLOEMER
525 WEST FIFTH STREET
SUITE 318
COVINGTON, KENTUCKY 41011
(606) 431-3200

Counsel of Record *

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

8877

QUESTIONS PRESENTED

1. Whether a litigant has a due process right to notice and an opportunity to be heard on a determining issue first raised sua sponte by a reviewing administrative tribunal and whether, once the lack of such notice and opportunity is appealed to the circuit court, the court can refuse to decide the appeal by asserting that the matter was not first raised by the petitioning party before the reviewing administrative tribunal.

2. Whether a determination by the circuit court whether a factual finding of an administrative agency is supported by substantial evidence on the record as a whole requires as an integral component of that inquiry a consideration of the difference in findings between the initial and reviewing tribunals and, where the reviewing tribunal rejects the credibility findings of the initial tribunal, whether the circuit court must determine if the reviewing tribunal expressly did so and identified the considerations which lead to that rejection.

3. Whether a willful violation of a standard promulgated under the Occupational Safety and Health Act requires proof of a greater degree of culpability on an employer's part than simple knowledge or awareness of a hazardous condition, and whether such a violation is not sustainable if an employer has made a good faith, even if not entirely effective, effort to comply with the standard.

LIST OF PARTIES

The Petitioner is National Engineering & Contracting Company, Inc., an employee-owned corporation.

The Respondents are the Secretary of Labor, Alexis M. Herman, and the Occupational Safety & Health Review Commission.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is National Engineering & Contracting Company v. Herman, Case No. 97-4362, which has been recommended for publication. (App. A). The Decision of the Occupational Safety and Health Review Commission ["Commission"] (App. B) and the Decision and Order of the Administrative Law Judge ["ALJ"] (App. C) are styled Secretary v. National Engineering & Contracting Company, OSHRC Docket No. 94-2787.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 4, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "no person shall . . . be deprived of life, liberty, or property, without due process of law. . . "

29 U.S.C. §660(a) provides in relevant part:

> Any person adversely affected or aggrieved by an order of the Commission . . . may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred. . . . No objection that has not been urged before the Commission shall be considered by the court, unless the failure and neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered a whole, shall be conclusive.

STATEMENT OF THE CASE

The fundamental issue is whether a litigant has a due process right to notice and an opportunity to be heard on a determining issue first raised sua sponte by a reviewing administrative tribunal and whether, once the lack of such notice and opportunity is appealed to the circuit court, the court can refuse to decide the appeal by asserting that the matter was not first raised by the petitioning party before the reviewing administrative tribunal.

A. The Proceeding Below

This case arises out of a construction accident that occurred in 1994 on an interstate highway in Cincinnati, Ohio when a "boom truck" — a flatbed equipped with a telescopic boom -- overturned. The Occupational Safety and Health Administration cited Petitioner, National Engineering, and alleged a violation of 29 CFR §1926.550(b)(2) (requiring a crane comply with the ANSI B30.5 — 1968 Safety Code for Truck Cranes), or "in the alternative" a violation of 29 CFR §1926.550(a)(1) (requiring such a crane comply with the manufacturer's specifications.)

At the hearing and in its Post-Hearing Brief before the ALJ, National Engineering maintained that it did not violate either standard. (National Brief pp.18-19). Specifically, with respect to subsection 550(a)(1), National Engineering maintained that use of its boom truck under the subject circumstances "does not violate the manufacturer's stated requirements in the Operator's Manual." (National

Engineering Brief p.23).[1] National Engineering further maintained that "the Secretary cannot sustain his claim that National Engineering violated the cited standards." (National Brief p.19).

The ALJ found that National Engineering violated subsection 550(b)(2), but the violation was not wilful. As accurately noted by the Sixth Circuit, however, the ALJ simply "did not address the Secretary's alternative proposal for a violation of 29 C.F.R. §1926.550(a)(1)." (App. 4a). Both National Engineering and the Secretary filed cross-petitions for discretionary review with the Commission, in which both parties sought review of the ALJ's decision regarding subsection 550(b)(2). Thereafter, the Commission accepted review and issued its Briefing Notice specifically limiting the crane standard issue to subsection 550(b)(2), without any review being directed on subsection 550(a)(1) for which no violation had been found. The Review Commission's Briefing Notice read:

> Did the judge err in reducing the classification of the alleged violation of §1926.550(b)(2) in Citation 2 Item 1 from willful to serious?

(Briefing Notice at No. 3. See also, App. 4a).

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[1] The Commission subsequently stated in its decision that "National Engineering does not dispute that its operation of the boom truck did not comply with the manufacturer's specification as shown by the Operator's Manual." (App. 31a). This was manifestly in error. The Sixth Circuit reiterated this error in its decision, stating "NECCO conceded that its operation of the boom truck on the night in question did not comport with the operation manual standards," citing the Commission's misstatement. (App. 10a).

Both National Engineering and the Secretary briefed arguments regarding the crane standard subsection 550(b)(2), as directed by the Commission. National Engineering argued that in all of its past decision, the Commission had consistently held that a "crane" for purposes of 29 CFR §1926.550 — whether subsection 550(a)(1) or 550(b)(2) — was limited to the type of crane defined by the ANSI standard, which definition did not include National Engineering's boom truck. Since the standard did not apply to the cited working condition, the Secretary could not meet her burden of proof. Secretary v. Unarco Comm. Products, 16 OSHC-BNA 1499, 1501 (No. 89-1555, 1993). (National Engineering's Commission's Brief, pp.36-42. See also App. 7a-8a). Thus, while National Engineering did not specifically brief the issue of the applicability of subsection 550(a)(1) to its boom truck, having limited its brief to the issue of subsection 550(b)(2) as directed by the Review Commission, it did urge the Review Commission to construe subsection 550(b)(2) consistent with its decisions regarding subsection 550(a)(1).

The Commission found that National Engineering willfully violated the OSHA crane standard, but did not do so on the basis of subsection 550(b)(2). Rather, it relied upon subsection 550(a)(1). (App. 31a).[2] By diverting its decision to this subsection, the Review Commission avoided the issue briefed by National Engineering (as well as the Secretary) that, by virtue of the Commission's own precedents,

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[2] In doing so, the Commission relied upon the erroneous statement that National Engineering did not dispute that its boom truck did not comply with the manufacturer's specifications. (App. 31a). In fact, as noted in footnote 1 infra, National Engineering specifically did so object.

subsection 550(b)(2) did not apply to National Engineering's "boom truck." In essence, the Commission:

- Refused to decide the issue upon which it directed review — whether subsection 550(b)(2) was violated:

- Arbitrarily and capriciously ignored its own precedents on the issue it unilaterally raised, subsection 550(a)(1); and

- Decided that issue upon a clear and manifest error of fact; i.e., that National Engineering had conceded a violation of the manufacturer's specifications. (See footnote 1, infra).

National Engineering filed a timely Petition for Review of the Commission's decision with the Sixth Circuit. National Engineering argued that the Commission's action violated National Engineering's right to due process by failing to provide it with notice and opportunity to be heard on the issue whether subsection 550(a)(1) was violated. It further argued that the Commission's action was an unexplained radical departure from its existing precedents regarding 29 CFR §1926.550 — whether subsection 550(a)(1) or 550(b)(2) — that a "boom truck" is not a crane for purposes of the OSHA crane standard; therefore, pursuant to 29 USC §660(a), the Sixth Circuit should vacate the Commission's decision as arbitrary and capricious. See, Graphic Comm. Int'l v. Salem-Gravure, 843 F.2d 1490 (D.C. Cir. 1988). National Engineering also argued that, even considering subsection 550(a)(1), the standard did not apply to its boom truck, thus the Secretary could not sustain her burden of proof. Unarco Comm. Products, supra at 1555. Finally, in the alternative, National Engineering requested that the matter

be remanded to the Commission for an opportunity to be heard on the subsection 550(a)(1) issue.

The Sixth Circuit refused to address whether any part of the OSHA crane standard covered National Engineering's boom truck. Instead, with respect to subsection 550(a)(1), it cited 29 USC §660(a) which provides that:

> No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

It then stated that National Engineering did not challenge the applicability of this subsection before the Commission, and only did so for the first time before the Court, thereby waiving its right to have the court review the issue. (App. 9a-10a).[3]

There are two obvious problems with this analysis. First, National Engineering did contend before the Commission that subsection 550(a)(1) did not cover its boom truck, albeit while fashioning its argument that the Commission's precedents under subsection 550(a)(1) to that effect were equally applicable to subsection 550(b)(2). Second, to the extent that National Engineering did not extensively brief the issue of whether subsection 550(a)(1) was violated, it did not do so — nor did the Secretary —

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[3] With respect to subsection 550(b)(2), since the Review Commission did not find that National Engineering violated this standard, the Sixth Circuit declined to address the matter. (App. 9a, n.5).

because the Commission only directed briefing on the issue of whether subsection 550(b)(2) was willfully violated. Any lack of briefing on the subsection 550(a)(1) issue was a result of the Commission's direction. Absent notice of, and an opportunity to be heard on, that matter, National Engineering was deprived of its right to due process of law.

The Sixth Circuit also rejected National Engineering's due process challenge. (App. 10a). In support it stated that: "NECCO, upon receipt of the ALJ's decision, had the discretion to determine those portions of the ALJ's decision it wished to appeal." (App. 10a). This is irrelevant. National Engineering had nothing to appeal, there having been no finding of a violation of subsection 550(a)(1). The Sixth Circuit also stated that: "If NECCO felt that subsection (a)(1) was inapplicable to its boom truck, NECCO should have raised that argument on review to the Commission." (App. 10a). Again, National Engineering had no need or reason to do so. There had been no finding of a violation of that subsection, nor was it provided notice by the Commission that it would ignore the assigned and briefed standard — subsection 550(b)(2) — and unilaterally rely on the alternative standard. Moreover, National Engineering did address subsection 550(a)(1) in its argument that its boom truck was not a "crane" encompassed by Section 1926.550, whether subsection (a)(1) or (b)(2). Finally, the Sixth Circuit stated that, during the ALJ hearing, National Engineering "had ample opportunity . . . to raise all arguments in defense of the alleged violations of subsections (a)(1) and (b)(2)." (App. 11a). This is immaterial. National Engineering did, in fact, argue before the ALJ that it did not violate the alternative standard, subsection 550(a)(1); however, the ALJ did not decide that issue. As noted above, there was no need or reason to appeal this subsection. A full exploration of the issue of this subsection only became necessary before the

Sixth Circuit, once the Commission unilaterally first raised the issue in its decision.

The Sixth Circuit's decision is inherently contradictory. It states that National Engineering is prohibited by the statute, 29 USC §660(a), from appealing the issue of section 1926.550(a)(1) because this matter was not before the Commission, yet it then affirms the Commission's decision based upon that very subsection. It also states that National Engineering was not denied due process before the Commission because it could have appealed the subsection 550(a)(1) matter to the Commission even though, at that time, since there had been no finding that the subsection was violated, there was nothing to appeal. Again, this is inherently contradictory.

The Commission's action in unilaterally raising and finding for the first time a violation of subsection 550(a)(1), and the Sixth Circuit's decision that, since this matter was not first raised by either party before the Commission, it was not properly before that court, combine to create a litigation "bait and switch," which is both unconstitutional as a deprivation of the right to due process, and is contrary to and a misapplication of the purposes of judicial appellate review as encompassed in 29 USC §660(a). Fundamentally, it is unfair to change the rules in the middle of the game. Judicial and administrative processes must provide justice; they should not be manipulated to deny a litigant its right to be heard.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S RULINGS ON THE ESSENTIAL DUE PROCESS RIGHTS OF A LITIGANT TO A FUNDAMENTALLY FAIR PROCEEDING

National Engineering's Petition for a Writ of Certiorari should be granted because the opinion below conflicts with this Court's rulings regarding a litigant's essential due process right to a fundamentally fair proceeding.

The core of the due process right set forth in the Fifth Amendment is the right to notice and a meaningful opportunity to be heard. LaChance v. Erickson, 522 U.S. 262 (1998); Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985). The right to be heard has little reality or worth unless one is informed as to the matter that is pending, and can chose whether to appear and contest the issue. Mullane v. Central Hanover Bk. & Trust Co., 339 U.S. 306, 314 (1950). The pending issues must be known before the proceeding begins; otherwise, the proceedings become a trap when, once underway, the issue is changed. In Re Ruffalo, 390 U.S. 544, 551, rehearing denied, 391 U.S. 961 (1968). The absence of fair notice as to the precise nature of the issue at hand in the hearing deprives the participant of the due process of law. Id.; LaChance, supra; Loudermill, supra; and, Mullane, supra.

The opinion below perpetuates the unconstitutional deprivation of due process occasioned upon National Engineering by the Commission's surprise decision to decide

the case under subsection 550(a)(1). National Engineering was not provided notice by the Commission that this subsection was at issue, nor that National Engineering was subject to the risk of a finding of a violation of this standard. LaChance, supra; Loudermill, supra. It had no chance to appear and to contest such a finding. Mullane, supra. It was found guilty of violating a standard about which it had no opportunity to argue and, even more egregious, it was found guilty on the basis of a clear mistaken assumption that it had admitted a violation of the standard. Indeed, the very egregiousness of this finding highlights and starkly illustrates the necessity for National Engineering to have had notice as to the charges against it. Absent such notice, National Engineering was entrapped and was blind-sided by the Commission's unilateral action. Id.; Ruffalo, supra. See also, Butler Lime Cement Co. v. OSHRC, 658 F.2d 544, 550 (7th Cir. 1981). (Simple due process requires that an employer have an opportunity to respond to an issue before the Commission or Court reaches a final decision on that basis.)

The Commission's unconstitutional treatment of National Engineering was aggravated by the Sixth Circuit's decision. Not only did the court err in not finding that National Engineering's due process rights had been violated, it enhanced that deprivation by its misreading and misapplication of 29 USC §660(a).

The statute requires that a litigant present, or otherwise "urge," its objections to the Commission before such issue will be considered by the Circuit Court upon appeal. This requirement is designed to advance judicial efficiency and economy; i.e., to insure that an issue has been fully litigated below, and that a party has not waived the matter. However, this concern plays no role where the

Commission itself sua sponte raises for the first time, and then decides an issue about which the Commission provided no notice to either party. In that circumstance, there was no issue that was waived by the litigant, since the litigant had no notice or opportunity to be heard on the matter before the Commission acted.

The Sixth Circuit misread and misapplied 29 USC §660(a) when it used the statute to further deny National Engineering's due process right to have a hearing on the issue of whether it violated the OSHA crane standard — either subsection 550(a)(1) or 550(b)(2). Under the Sixth Circuit approach, a litigant like National Engineering faces a classic Catch-22 conundrum. When a litigant is confronted with a unilateral and unconstitutional act by the reviewing administrative tribunal, it cannot seek appellate review of that unconstitutional act because the litigant itself did not first invite, or urge, the reviewing administrative tribunal to act in the improper manner. The Sixth Circuit's interpretation and application of 29 USC §660(a) disserves the appellate review process, and undermines the constitutional underpinnings of judicial review: a fair and orderly administration of the laws. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

National Engineering was deprived of its due process right to notice and hearing of the charge against it. Its Petition for Certiorari should be granted so that the Court may confirm the fundamental importance of its longstanding holdings on due process, and so that it may confirm that this guarantee applies to a Commission proceeding.

II. THE PETITION SHOULD BE GRANTED TO CONFIRM AND CONFORM THE CONSTRUCTION OF THE APPELLATE REVIEW PROVISION IN 29 USC §660(a) TO PROMOTE CONSISTENCY AND CONSTITUTIONALITY IN ITS APPLICATION

The Petition should be granted to correct the lower court's misinterpretation and misapplication of the appellate review provision in 29 USC §660(a) so as to conform and confirm the statute's purpose in a manner that promotes consistency and constitutionality.

The opinion below misinterprets and misapplies the appellate review provisions set forth in 29 USC §660(a). The lower court's mechanical application of the statutory language strips it of its purpose to ensure appropriate judicial review for aggrieved parties. Moreover, the lower court's misreading of the statute also enhances the deprivation of due process already occasioned to National Engineering.

Language such as that found at 29 USC §660(a) is standard in many statutes providing judicial review of the actions of administrative agencies. See e.g., 5 USC §706(2)(e). If allowed to stand, the lower court's Catch-22 construction threatens to undermine the body of law developed under those provisions, as well as to undermine the proper construction and application of Section 660(a).

The Court should grant the Petition so that it can confirm and conform the appellate review language in 29 USC §660(a) to its intended purpose, consistent with that of similar statutes. Alternatively, the Court should grant the Petition because: (1) since the Commission did, in fact, decide the case on the issue of 29 CFR §1926.550(a)(1), such matter was

reviewed by the Commission sufficient to be a prerequisite to review by the Sixth Circuit; (2) National Engineering did sufficiently "urge" the issue of subsection 550(a)(1) to the Commission in its arguments regarding subsection 550(b)(2); (3) the circumstances of this case, specifically the unconstitutional action of the Review Commission, constitute "extraordinary circumstances" under the statute sufficient for the matter to have been reviewed by the Sixth Circuit; or, (4) where an issue, such as whether the standard applies to the cited condition, is a part of the Secretary's prima facie case, the issue has been adequately raised before the Commission for purposes of the statute. RMI Co. v. Secretary of Labor, 594 F.2d 566 (6th Cir. 1979). See also, Rothstein, Occupational Safety and Health Law §463 at p.494 (4th ed. 1998).

III. THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS AS TO THE APPROPRIATE CRITERIA FOR A WILLFUL VIOLATION OF AN OSHA STANDARD, AND AS TO THE APPELLATE STANDARD OF REVIEW OF A CREDIBILITY DETERMINATION REGARDING SUCH A WILLFUL VIOLATION

National Engineering was cited by OSHA for a willful violation of the crane standard. 29 USC §666(a) authorizes the Secretary to enhance penalties for willful violations of OSHA standards. The term "willful" is not otherwise defined under the Act. This Court has not addressed the proper criteria to consider for determining when such a willful violation occurs.

The ALJ found that National Engineering did not willfully violate OSHA's crane standard. (App. 59a). This

decision was based upon the ALJ's weighing of the credibility of the witnesses. (App. 54a-55a). The ALJ ascribed greater credibility to the evidence that National Engineering had a good faith belief that it was operating its boom truck in a safe manner as required by the crane standard such as to render the violation not willful. (App. 59a).

On review, the Commission reversed the ALJ. While it found that National Engineering did not intentionally or knowingly violate the crane standard ("We do not find ... a conscious disregard of [the standards], and the record does not show that National actually knew of the cited standards.") (App. 34a-35a, n.19), it nonetheless rejected the ALJ's credibility findings, without explanation as to a reason for that rejection, and found that National Engineering acted with "plain indifference" to the Act. (App. 38a).

In its opinion, the Sixth Circuit held that substantial evidence supported the Review Commission finding of willfulness, but did so upon a different basis. It held that willfulness for purposes of the Act consisted of either an act knowingly taken without regard to its legality, or one taken where the employer was conscious of the Act's requirements and consciously continued its contrary practice. (App. 12a). The court also affirmed the Commission's reversal of the ALJ's credibility finding in the absence of an explanation from the Commission as to why it disregarded those findings.

The Sixth Circuit's action is in conflict with the principles applied by other circuit courts for reviewing an ALJ's credibility determinations. The lower court's decision is also in conflict with the body of law developed by other circuit courts as to what constitutes a willful violation of the Act.

A. Standard for Review

Evidence sufficient to support a finding on the record as a whole may be less than substantial when an impartial and experienced examiner who has observed the witnesses and lived with the case draws conclusions different from those made by the reviewing administrative tribunal, especially where credibility is important. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Accordingly, the circuit courts have required that when the Commission reverses the factual findings of an ALJ, it must articulate reasons for its failure to credit those findings. See, Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974). (Administrative agency must explain grounds for rejecting ALJ's disposition.) Brock v. Morello Bros. Constr., Inc., 809 F.2d 161 (1st Cir. 1987). (ALJ's findings on subjective state of mind entitled to great deference.) See also, Parker v. Bowen, 788 F.2d 1512 (11th Cir. 1986).

The Commission failed to provide any reason for its failure to credit the ALJ's findings that National Engineering did not willfully violate the crane standard. The Sixth Circuit then erred in not requiring such an explanation as a part of its review of whether there was substantial evidence to support the Commission's action. The lower court's approach conflicts with that of the other circuits' which have applied the principles set forth in Universal Camera Corp., supra. The Petition should be granted to resolve that conflict.

B. Standard for Willfulness

The Sixth Circuit adopted a dual definition for a willful OSHA violation: either a knowledgeably taken act, or where an employer, conscious of the requirements of a standard, consciously continues in its contrary practice.

(App. 12a). The lower court also rejected good faith efforts at compliance as immaterial to its consideration of the willful violation. (App. 12a). The court relied on its prior decision in Donovan v. Capital City Excavating Co., 712 F.2d 1008, 1010 (6th Cir. 1983)

The Sixth Circuit's construction of a willful violation conflicts with that of other circuits. These apply a different approach.

> An OSHA violation is willful if it is committed with intentional disregard of, or plain indifference to, the requirements of the statute.

Caterpillar, Inc. v. OSHRC, 122 F.3d 437, 440 (7th Cir. 1997). See, Conie Constr. v. Reich, 73 F.3d 382 (D.C. Cir. 1995). Moreover, the circuit courts have held that:

> A willful violation is differentiated from other types of violations by a heightened awareness — of the illegality of the conduct or conditions — and by a state of mind — conscious disregard or plain indifference.

Caterpillar, Inc., supra, 122 F.3d at 440. A willful violation includes this additional requirement of a heightened awareness of the illegality of the conduct to distinguish it from the less egregious "serious" violation governed by 29 USC §666(k), which is based upon employer knowledge of the violation. Morello Bros. Const., Inc., supra, 809 F.2d at 164. Finally, the other circuit courts also have construed the OSHA willful standard to require a consideration of the employer's good faith efforts at compliance with the standard. Id. Caterpillar, Inc., supra, 122 F.3d at 441-442.

The Sixth Circuit found that National Engineering had willfully violated the OSHA crane standard under its holding that knowledge by the employer as to the violative conduct alone was sufficient to sustain a willful violation.[4] In doing so, the Sixth Circuit improperly equated a willful violation with a serious violation contrary to the statutory distinction between these two types of violations. Additionally, unlike the other circuits, the Sixth Circuit refused to consider the good faith nature of National Engineering's state of mind as mandated by an appropriate construction of the willful standard. This error coincides with its error in not requiring the Commission to explain why it improperly rejected the ALJ's findings that National Engineering acted in good faith.[5]

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[4] The Sixth Circuit's finding of willfulness was based upon its initial knowledge of the act definition of willfulness and not upon its second definition of a consciousness of the requirements of the rule. The Review Commission had found that National Engineering did not act with knowledge of the OSHA crane standard, nor did it consciously disregard its requirements. (App. 34a-35a, n. 19). The circuit court did not challenge this finding.

[5] Most impressive to the ALJ was the fact that the boom truck operator, himself one of the injured employees, continued to operate his boom truck from the same side to which it eventually fell because of his belief that he was operating it in accordance with safe practice. (App. 58a). The fact that the operator remained in what subsequently became a harmful position was stark evidence that neither he nor his crew acted with intentional disregard or plain indifference to safety.

The Petition should be granted to resolve the conflict among the circuits as to the proper definition of a willful violation under the Act, and whether such necessitates a consideration of the employer's good faith efforts at compliance.

CONCLUSION

This case presents questions of exceptional importance to the due and orderly administration of the law, specifically as it relates to proceedings before the Occupational Safety and Health Review Commission, and to the proper judicial review of those proceedings. Accordingly, National Engineering respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

/s/_____
KENT W. SEIFRIED
POSTON, SEIFRIED & SCHLOEMER
525 West Fifth Street
Suite 318
Covington, Kentucky 41011
(606) 431-3200

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: June 4, 1999]

No. 97-4362

On Appeal From The Occupational Safety & Health Review Commission (No. 94-2787)

NATIONAL ENGINEERING & CONTRACTING COMPANY, *Petitioner*,	)
v.	)
ALEXIS M. HERMAN, UNITED STATES SECRETARY OF LABOR; THE OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION, *Respondents*.	)

OPINION

DUGGAN, District Judge. This matter is before the Court on petitioner National Engineering & Contracting Company's ("NECCO") petition for review of a final order of the Occupational Safety and Health Review Commission

("Commission"). Initially, the case was heard before Administrative Law Judge Paul J. Brady ("ALJ") who issued a decision in this matter on February 21, 1996. The Commission reviewed the findings of the ALJ and issued its final decision on September 30, 1997. Following the Commission's issuance of its decision, NECCO asserted this timely appeal.

Procedural History

The facts underlying this administrative appeal involve an accident occurring at a highway construction worksite on Interstate 71 outside of Cincinnati, Ohio. On August 16, 1994, a "boom truck,"[1] operated by NECCO, overturned, fatally injuring one employee and seriously injuring two others. The accident occurred during the use of the boom truck to place concrete traffic barriers onto the highway worksite. The Occupational Safety and Health Administration ("OSHA") conducted a worksite inspection following the accident and issued five serious citations and one willful citation. OSHA cited NECCO for a violation of two OSHA crane standards, 29 C.F.R. §1926.550(b)(2)[2], or in the

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[1] The "boom truck" at issue was a 22-ton Manitex 2284. The boom truck was equipped with a telescoping boom that extended or retracted hydraulically and a flatbed on which material was transported. (JA 511). The equipment on the boom truck consisted of a pair of front outriggers located amidship, and a pair of rear stabilizers located on each side of the rear of the boom truck. (*Id.*)

[2] 29 C.F.R. §1926.550(b)(2) provides, in pertinent part:

alternative, 29 C.F.R. §1926.550(a)(1)[3] for NECCO's failure to extend and set the outriggers and stabilizers on the boom truck as specified by the manufacturer. OSHA proposed the maximum penalty of $70,000 for a willful violation. *See* 29 U.S.C. §§659(a), 666(a). NECCO contested the imposition of the willful citation at a hearing,[4] and asserted affirmative

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§1926.550 Cranes and derricks.
* * *

(b) Crawler, locomotive, and truck cranes.

(2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes. . . .

Section 5-3.2.3 of ANSI B30.5-1968 provides:

i. Outriggers shall be used when the load to be handled at that particular radius exceeds the rated load without outriggers as given by the manufacturer for that crane.

[3] 29 C.F.R. §1926.550 Cranes and derricks.

(a) General requirements.

(1) The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks.

[4] With respect to the serious violations, the Secretary of Labor ("Secretary") withdrew one violation, and the ALJ affirmed two and vacated two. NECCO does not contest the disposition of the serious violations.

defenses of vindictive prosecution and unpreventable employee misconduct.

The ALJ conducted a four-day hearing, which resulted in the finding of a violation of 29 C.F.R. §1926.550(b)(2). However, the ALJ reclassified the offense as "serious" instead of "willful" and imposed a fine of $10,000. The ALJ determined that he did not have jurisdiction to entertain the affirmative defense of vindictive prosecution but permitted NECCO to proffer its evidence. Further, the ALJ rejected NECCO's unpreventable employee misconduct defense, but did not address the Secretary's alternative proposal for a violation of 29 C.F.R. §1926.550(a)(1).

Both parties filed cross-petitions for discretionary review with the Commission. The Commission directed review of the following three issues: whether the Commission had jurisdiction to entertain a vindictive prosecution defense; whether the evidence NECCO proffered in support established the defense; and whether the ALJ erred in reducing the 29 C.F.R. 1926(b)(2) citation from willful to serious. In reaching its final decision, the Commission concluded that the ALJ erred in denying jurisdiction over the defense of vindictive prosecution; however, it concluded that NECCO failed to make a threshold showing necessary to establish it. The Commission then determined the ALJ erred in reducing the classification of the crane violation from willful to serious. The Commission affirmed the Secretary's willfulness designation but on the alternative ground that 29 C.F.R. §1926.550(a)(1) had been violated. The issue of the applicability of 29 C.F.R. §1926.550(b)(2) was not addressed by the Commission in its decision. The Commission assessed the maximum $70,000 penalty that OSHA recommended.

Statement of Facts

NECCO is a construction company engaged in road work projects. In August 1994, the Ohio Department of Transportation hired NECCO as the general contractor for the purpose of erecting a sound wall along a six-mile portion of Interstate 71 near Cincinnati, Ohio. In order to facilitate the progress of the project, NECCO moved concrete traffic barriers at night so that workers constructing the sound wall during the day would be barricaded from traffic. The concrete traffic barriers were ten to twelve feet long and weighed 3700-4000 pounds.

On August 16, 1994, NECCO's 22-ton Manitex Model 2284 boom truck ("boom truck") overturned, crushing a laborer, Lloyd Lee, to death. In addition, the crane operator and another worker sustained serious injury. The boom truck has a crane mounted behind its cab to permit operation from control stations on the left and right side. The truck contains four supports, two front outriggers and two rear stabilizers, that extend and retract. When the outriggers are fully extended, the boom truck is supported and leveled, allowing it to lift and deploy heavy loads without the danger of overturning.

On the night of the accident, the boom truck transported eight concrete traffic barriers at a time to the worksite. At the worksite, the crane unloaded and lowered each barrier, one at a time, assisted by several workers. Mr. Lee was assigned the task of shining a flashlight to the end of the lowered barrier where it was to be joined to the preceding barrier by inserting a rod through the rings. At the time of the accident, the crane overturned because it attempted to

"pick" a load off the passenger side of the truckbed with both front outriggers retracted and the two rear stabilizers down but not fully extended. It is undisputed that the supports could have been extended if the operator of the boom truck had pulled forward ten feet before making the lift. Instead, the operator of the boom truck attempted to set the barrier without moving forward an additional ten feet so as to provide for ample room to deploy the outriggers and stabilizers.

Standard of Review

Pursuant to 29 U.S.C. §660:

> Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred . . . .

29 U.S.C. 660(a). This Court has jurisdiction to adjudicate the merits of NECCO's contention that the Commission improperly reversed the findings of the ALJ. Our review of the facts, as found by the agency or the official charged with agency operations, is whether or not there is substantial evidence in the record as a whole to support the facts as found. 29 U.S.C. §660(a); *Carlisle Equip. Co. v. United States Secretary of Labor*, 24 F.3d 790, 792 (6th Cir. 1994) (citing *Dunlop v. Rockwell Int'l*, 540 F.2d 1283, 1287 (6th Cir. 1976)). Further, the Commission's order is viewed favorably and determinations of law must be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); *Nelson Tree*

Serv. v. Occupational Safety and Health Review Comm'n, 60 F.3d 1207, 1209 (6th Cir. 1995) (quoting *Empire-Detroit Steel Div. v. Occupational Safety and Health Review Comm'n*, 579 F.2d 378, 383 (6th Cir. 1978)). We apply the aforementioned standards to NECCO's claims contesting the merits of the Commission's decision.

Analysis

NECCO contends that the Commission's finding that it willfully violated 29 C.F.R. §1926.550(a)(1) is arbitrary and capricious and not supported by substantial evidence. NECCO asserts that the Commission's decision was arbitrary and capricious because the Commission addressed the alternative crane standard, to wit 29 C.F.R. §1926.550(a)(1), in the absence of notice to NECCO and the Secretary. Second, NECCO claims that the Commission's decision is not supported by substantial evidence because it allegedly "impermissibly focused on singular evidence and disregarded other pertinent evidence. . . ." (NECCO Br. at 19).

I. Applicability of 29 C.F.R. §1926.550(a)(1)

NECCO contends that the Commission's conclusion that NECCO violated 29 C.F.R. §1926.550(a)(1) is arbitrary and capricious. In support, NECCO asserts that the Commission reached this conclusion because it desired to avoid addressing the issue of whether NECCO violated subsection §1926.550(b)(2) as concluded by the ALJ. Essentially NECCO contends that neither subsection (a)(1) nor (b)(2) by definition applies to its boom truck.

With respect to applicability of subsection (a)(1),

NECCO contends that

> In all of its past decisions, the Review Commission has consistently determined that a crane under any part of Section 1926.550 is a machine which meets the scope, definitions, and illustrations set forth in ANSI B30.5-1968. Now, however, without explanation, the Review Commission executes a radical about-face and holds that subsection 550(a)(1) of the standard clearly applies to the cited boom truck . . . even though by virtue of its past decisions, a crane for the purposes of 550(a)(1) is limited to the type encompassed by ANSI B30.5-1968, which does not include boom trucks.

(NECCO Br. at 24).

The Secretary responds by asserting that NECCO is precluded from raising this issue on appeal because NECCO failed to raise a coverage argument with respect to either (a)(1) or (b)(2) in the first instance to the ALJ. According to the Secretary, NECCO challenged the designation of the violation of (b)(2) as willful by asserting an unpreventable employee misconduct defense, but it did not challenge the scope or applicability of either of the regulations to its boom truck. NECCO first argued that subsection (b)(2) of section 1926.550 did not apply to the boom truck's crane in its brief on the merits to the Commission. However, the Commission declined to review such an argument because NECCO failed to assert it in the first instance to the ALJ, the Secretary did not have the opportunity to contest such a claim, and the issue

was not jursidictional. Instead, the Commission determined that subsection (a)(1) applied and held NECCO liable for the violation.

The Court agrees with the Secretary to the extent she contends that NECCO waived its right to challenge the applicability of subsection (a)(1). Section 11(a) of the Occupational Safety and Health ("OSH") Act, 29 U.S.C. §660(a) specifically provides: "No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. §660(a). NECCO did not challenge the scope or applicability of subsection (a)(1) of section 1926.550 before the Commission, or even before the ALJ.[5]

NECCO's attempt to challenge the applicability of subsection (a)(1) for the first time on appeal to this Court must be rejected. Review by the Commission is a necessary prerequisite to review by this Court. *Globe Contractors, Inc. v. Herman*, 132 F.3d 367, 370 (7th Cir. 1997); *D.A. Collins Constr. co., Inc. v. Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997) (holding that failure to raise defect in

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[5] Although NECCO did contest the (b)(2) violation before the ALJ and attempted to raise a "coverage" challenge before the Commission, which was rejected by the commission, it did not raise such issues with respect to the violation of (a)(1). The conviction for a violation of (a)(1) is the subject of the instant appeal. The Commission did not find NECCO liable for a (b)(2) violation. Thus, we decline to address the Commission's failure to address the applicability, if any, of subsection (b)(2) to NECCO's boom truck.

Secretary's *prima facie* case in petition to the Commission for review resulted in a waiver of the ability to present this defense). NECCO was originally cited for a violation of subsection (a)(1) or (b)(2) in the alternative. In the proceeding before the Commission, NECCO did not dispute the applicability of (a)(1). In fact, NECCO conceded that its operation of the boom truck on the night in question did not comport with the operation manual standards. (JA 16). Thus, to the extent NECCO argues on appeal to this Court for the first time that subsection (a)(1) is inapplicable, we conclude that NECCO is precluded from challenging the applicability of subsection (a)(1) for the first time on appeal to this Court.

II. Due Process Claim

NECCO next alleges a denial of due process because the Commission found a willful violation of section 1926.550(a)(1) where the Commission's briefing notice requested briefing on the section 1926.550(b)(2) argument. The Court rejects this argument. From the inception of the administrative process, NECCO was on notice that it had been cited, in the alternative, for a violation of either subsection (a)(1) or (b)(2). The fact that the ALJ found a serious violation of section 1926.550(b)(2), and the Secretary sought review of this finding, is insufficient to afford NECCO the reprieve it is seeking. NECCO, upon receipt of the ALJ's decision, had the discretion to determine those portions of the ALJ's decision it wished to appeal. If NECCO felt that subsection (a)(1) was inapplicable to its boom truck, NECCO should have raised that argument on review to the Commission. Further, NECCO had the opportunity to be heard at the four day hearing before the ALJ, at which ample

opportunity was provided to raise all arguments in defense of the alleged violations of subsections (a)(1) and (b)(2). Accordingly, we find that the commission's decision to find a willful violation of subsection (a)(1), in absence of notification to NECCO in its briefing order, is not tantamount to a denial of NECCO's due process rights.

III. Substantiality of Evidence to Support Commission's Finding of Willful Violation

The Commission concluded that the evidence before it, as gleaned from the record as a whole, was sufficient to establish a willful violation of 29 C.F.R. §1926.550(a)(1).

The OSH Act provides that "The findings of the commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. §660(a). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Advance Bronze, Inc. v. Dole*, 917 F.2d 944, 950 (6th Cir. 1990) (quoting *Empire-Detroit Steel*, 579 F.2d at 383 (6th Cir. 1978). "The substantial evidence test protects both the factual findings and the inferences derived from them, and if the findings and inferences are reasonable on the record, they must be affirmed even if this court could justifiably reach a different result *de novo*." *Modern Drop Forge Co. v. Secretary of Labor*, 683 F.2d 1105, 1109 (7th Cir. 1982). The willfulness of an OSH Act violation is a factual finding and is reviewed under this substantial evidence standard.

We have previously held that a willful violation is action "taken knowledgeably by one subject to the statutory

provisions in disregard of the action's legality." *Empire*, 579 F.2d at 383. A willful violation occurs where the employer is "conscious" of the requirements of a rule and "nonetheless . . . consciously continues" in its contrary practice. *Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983). Conduct is willful if it is "intentional, deliberate, and voluntary." *Id.*

We conclude that the Commission's decision that NECCO willfully violated section 1926.550(a)(1) is supported by substantial evidence in the record. The Commission determined that the critical provision with which NECCO failed to comply was "the clear command in the manufacturer's manual to have all outriggers and stabilizers fully deployed whenever the boom is used." (JA16). Section 1926.550(a)(1) requires that the employer conform to the crane manufacturer's specifications and limitations for operating the crane. It is undisputed that the crane's manual and the two warnings explicitly posted on the boom truck warn of the necessity for compliance with the manual and the prohibition on operation of the crane with the outriggers and stabilizers retracted.[6] NECCO acknowledges that it was

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[6] The operating manual for the boom truck requires:

Setting the Outriggers and Stabilizers

1. All crane operations shall be performed with the outriggers and the stabilizers extended on a firm foundation so the crane is level.

On the 2200 Series, the stabilizer boxes shall be fully extended. **Crane operations with outriggers or stabilizers retracted is**

aware of the necessity of operating the crane with the outriggers and stabilizers in place. (NECCO Br. at 27-28). Despite this knowledge, NECCO operated the crane with either partial deployment or no deployment of the supports while lifting and placing traffic barriers in spaces too tight to fully deploy the supports.

Further, evidence exists in the record supporting the conclusion that NECCO previously engaged in a practice of operating the crane without the outriggers and stabilizers fully deployed. The Commission noted NECCO's policy to perform lifts irrespective of whether the outriggers or

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prohibited. (J.A.17) (emphasis in original).

Further, the following warnings appeared on the crane:

DANGER

YOU MUST NOT OPERATE THIS CRANE UNLESS:

2. YOU KNOW AND FOLLOW THE SAFETY AND OPERATING RECOMMENDATIONS CONTAINED IN THE MANUFACTURER'S MANUALS, YOUR EMPLOYER'S WORK RULES AND APPLICABLE GOVERNMENT REGULATIONS.

The other posted warning stated:

CAUTION

DO NOT USE THIS EQUIPMENT EXCEPT ON SOLID, LEVEL SURFACE WITH OUTRIGGERS PROPERLY EXTENDED . . .

stabilizers were fully extended. In support, the Commission pointed to the testimony of OSHA Compliance officer Collier who testified that NECCO's policy was to utilize the outriggers and stabilizers when space permitted; however, the use of the crane was sanctioned when a physical barrier did not allow for full deployment.[7] Foreman Ruf proffered testimony in which he indicated that where space was limited, the boom truck was operated without the front outriggers and rear stabilizers fully extended. Crane Operator Foster testified that the normal procedure was to fully extend the outriggers and stabilizers when space permitted.

It is further undisputed that on the night in question, the operator of the boom truck, Mr. Foster, did not advance the boom truck forward so as to permit the full extension of the outriggers in compliance with the operation manual. In view of the record as a whole, the evidence supports a finding that NECCO operated the boom truck in question in violation of the provisions of the manufacturer's specifications. Such conduct constitutes a violation of subsection 19265.550(a)(1). Thus, we are satisfied that a substantial evidence exists supporting the Commission's finding that NECCO willfully violated subsection 1926.550(a)(1).

IV. Vindictive Prosecution

NECCO's next point of appeal is predicated on the

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[7] The substance of Officer Collier's testimony is comprised of his interviews with Night Superintendent Seeger and Foreman Ruf, both of whom were employed by NECCO at the time of the incident in question.

Commission's rejection of its proffered defense of vindictive prosecution. NECCO argued to the Commission that officials in the Charleston, West Virginia and Columbus, Ohio offices of OSHA either testified, stated in depositions, or told witnesses that NECCO was a "bad actor" and that OSHA would "play hardball" and "get them." (Final Commission Order at 5, J.A. at 11). NECCO also claims that OSHA's Columbus office withdrew all citations and proposed penalties in Docket No. 92-2085, an unrelated case, after NECCO discovered through an OSHA compliance officer's deposition that OSHA allegedly had an improper motive for pursuing prosecution. NECCO also asserts that it requested a "warrant" in connection with four unrelated cases in which the OSHA Charleston, West Virginia office conducted an inspection of a NECCO work site in Goldtown, West Virginia. In addition, NECCO relies upon OSHA's maintenance of a computerized history database that allegedly characterizes NECCO as violating multiple safety standards and receiving several penalties in conjunction with these violations. Finally, NECCO relies upon what it characterizes as the expedient issuance of citations in connection with the accident at issue in the instant case.

The ALJ determined that he did not have jurisdiction to entertain NECCO's vindictive prosecution defense; however, the ALJ permitted NECCO to proffer evidence in support of this defense. NECCO requested review of this finding with the Commission. The Commission ultimately determined that the ALJ erred in determining he did not have jurisdiction to decide the vindictive prosecution theory. However, the Commission addressed the merits of NECCO's claim and concluded that NECCO "failed to make the threshold showing required to establish vindictive

prosecution." (Final Commission Order at 6, J.A. at 12). NECCO contends that this conclusion was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Empire*, 579 F.2d at 383 (quoting 5 U.S.C. §706(2)(A)).

In order to establish a claim of vindictive prosecution, a plaintiff must show: "(1) exercise of a protected right; (2) the prosecutor's 'stake' in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct; and, presumably, (4) that the prosecution was initiated with the intent to punish the plaintiff for the exercise of the protected right." *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir. 1996). Thus, a person claiming to be vindictively prosecuted, "must show that the prosecutor had some 'stake' in deterring the petitioner's exercise of his rights, and that the prosecutor's conduct was somehow unreasonable." *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir. 1991).

The Court agrees with the Commission that NECCO has not proffered sufficient evidence to meet the threshold requirement necessary to support a claim of vindictive prosecution. The allegedly "vindictive prosecution" to which NECCO refers is the Cincinnati, Ohio OSHA office's characterization of NECCO's conduct in the 1994 accident at issue in this litigation as "willful." However, NECCO's exercise of a protected right is founded upon its prior request from a warrant from the Charleston, West Virginia office before the search of a workplace in West Virginia. The record is utterly devoid of any showing by NECCO that the request for a warrant on the West Virginia worksite is in any manner connected to the investigation of a fatal accident by

the Cincinnati, Ohio office.

Moreover, the Commission determined that even if NECCO's evidence could properly state a presumption of vindictiveness, the presumption is rebutted by the reasonableness of the Secretary's willful characterization. The Cincinnati, Ohio OSHA office investigated the worksite after a fatality occurred, and two other workmen were injured. Following the investigation, the office determined that NECCO failed to comply with an operator safety manual, and with express warnings contained on the boom truck. Based on this evidence, we believe it was reasonable for the Secretary to conclude that NECCO wilfully violated an OSHA standard. Thus, we do not believe that the Commission's decision rejecting NECCO's defense of vindictive prosecution was in error.

CONCLUSION

For all of the reasons stated herein, the decision of the Commission is AFFIRMED.

APPENDIX B

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1120 20TH STREET, N.W., NINTH FLOOR
WASHINGTON, DC 20036-3419

[Filed: November 30, 1997]

OSHRC Docket No. 94-2787

SECRETARY OF LABOR,
Complainant,

v.

NATIONAL ENGINEERING &
CONTRACTING COMPANY,
Respondent,

L.I.U. OF N.A., LOCAL 265,
I.U.O.E., LOCAL 18,
Authorized Employee Representatives.

DECISION

Before: WEISBERG, Chairman; GUTTMAN, Commissioner.

BY THE COMMISSION:

At issue is whether Administrative Law Judge Paul L. Brady erred in ruling that the Commission is without jurisdiction to entertain the affirmative defense of vindictive prosecution and in reducing the classification of citation 2, item 1 from willful to serious. For the reasons that follow, we find that the Commission has jurisdiction to entertain the affirmative defense of vindictive prosecution, but find that Respondent has failed to establish that defense here. We also find that the judge erred in reducing the classification of citation 2 item 1. We affirm the citation item as willful and assess the proposed penalty of $70,000.

I. Background

National Engineering and Contracting Company ("National") is headquartered in Strongsville, Ohio and performs road work projects in Ohio and neighboring states. It was the general contractor under a contract with the Ohio Department of Transportation to build a sound wall alongside a six mile stretch of Interstate 71 near Cincinnati. During the evening, concrete traffic control barriers were placed along the berm line of the highway to provide a barrier between the life traffic and the sound wall construction. The concrete barriers came in 10 and 12 foot lengths and estimates of their weight ranged from 3,700 pounds up to two tons.

On the evening of August 16, 1994, National was placing a short section of concrete barriers towards an exit ramp with a 22-ton flatbed truck with a Manitex 2200 series crane boom mounted behind the truck's cab. National had planned to move roughly three loads of concrete barriers that

night (the equivalent of approximately 250 to 300 feet of barriers).[1] The 22-ton truck could carry up to eight concrete barriers on its bed and had outriggers towards the front of the truck bed and stabilizers at the rear.

At least six National employees were involved in placing the barriers. Employee Lloyd Lee's job was to shine a flashlight between the concrete barriers so that the other workers could line them up and connect them together. The barriers were being placed from the passenger side of the truck. William Sanders, a laborer, climbed up into the cab to move the truck to place the last barrier left on the bed. The outriggers, which were lifted in preparation for the move forward, could have been put down if the boom truck was moved 10 feet further forward. However, someone (the record is unclear as to whom) said that the truck was fine where it was, so Sanders did not move the truck. At that point, both outriggers were up and the rear stabilizers were down but not extended as required by the manufacturer's manual. Crane Operator Mark Foster decided to go ahead and position the last concrete barrier from the boom truck's bed onto the road.[2] The boom truck flipped to its side when

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[1] National used different types of equipment to move the concrete barriers depending on how many barriers were to be set in one evening. For placing long sections of barriers, National would use a large flatbed trailer to deliver the concrete barriers, and an excavator, backhoe or crane to position them.

[2] Foster testified as follows:

A. I had set three barrier[s] already. I knew from running the machine that I could set four, but with them being ten-foot long, I knew I had [to] pick the right, front outrigger

Foster was setting the last barrier. Employee Lloyd Lee was caught between the concrete barrier and boom truck and was killed. Crane Operator Foster suffered a severe hematoma and was off work for sixteen weeks.[3]

Following an inspection, OSHA cited National for one willful and five serious violations of the Act. The serious violations are not at issue. Willful Citation 2, Item 1, alleged a violation of 29 C.F.R. §1926.550(b)(2), or in the alternative 29 C.F.R. §1926.550(a)(1), for National's failure to extend and set the outriggers and stabilizers on the boom truck as specified by the manufacturer. National contested the citations and proposed penalties. At the hearing, National attempted to introduce evidence on the affirmative defense of vindictive prosecution that it had raised in its Answer. The Secretary objected to its introduction[4] and the judge ruled that he was without jurisdiction to entertain the affirmative defense. However, the judge permitted National to make a proffer of its evidence on the vindictive prosecution issue,

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up to get it into place.

Q. In other words, the right, front outrigger, the one on the passenger's side was sitting where you would have placed the next concrete barrier?

A. Yes, ma'am. So, I picked it up to get it out of the way.

[3] Night Superintendent Andrew Seeger testified that another laborer had "a little shoulder problem" as a result of the accident.

[4] The Secretary now agrees that the Commission can entertain an affirmative defense of vindictive prosecution.

comprised of testimony, affidavits and exhibits.[5] In its Post-Hearing Brief, National asked the judge to reconsider his ruling but he declined to do so in his decision.

The judge found that National had violated section 1926.550(b)(2) because it was undisputed that "the load exceeded the crane's rated load without outriggers and that all the outriggers should have been extended." The judge rejected National's unpreventable employee misconduct defense, finding that National failed to show what work rule Foster violated by performing the lifts without the outriggers extended, and that National "permitted lifts to be made with the outriggers undeployed." The judge held that it was not a willful violation, although he found that "[i]t is a close question." He found that "the evidence failed to show a 'heightened awareness' of the illegality of making the lifts without extending all the outriggers or a conscious disregard or plain indifference to employee safety." The judge affirmed the violation as serious and assessed a penalty of $10,000, although the statutory maximum for a serious violation is $7,000. *See* Section 17(a) of the Act, amended by Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 3101 (1990).

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[5] National has not requested that the record be reopened to receive additional evidence on its vindictive prosecution defense. Instead, it claims that the evidence submitted has "established its defense in the case."

II. Vindictive Prosecution

Vindictive prosecution is a prosecution to deter or punish the exercise of a protected statutory or constitutional right. *United States v. Goodwin*, 457 U.S. 368, 372 (1982). Although there is no uniform test for proving that a prosecution was vindictive, a threshold showing common to all tests is evidence that the government action was taken in response to an exercise of a protected right.[6] If governmental misconduct is found, the court can dismiss the vindictively motivated charge or the entire action. *United States v. Meyer*,

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[6] The two circuits to which this case may be appealed formulate the vindictive prosecution defense differently. In the Sixth Circuit, the claimant must show: (1) exercise of a protected right; (2) the prosecutor's "stake" in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct; and, presumably, (4) that the prosecution was initiated with the intent to punish the plaintiff for exercise of the protected right. *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 296 (1996). The District of Columbia Circuit has stated that there are two ways in which prosecutorial vindictiveness may be shown: (1) actual vindictiveness as shown through objective evidence that a prosecutor acted in order to punish a respondent for standing on his legal rights; (2) a presumption of vindictiveness demonstrated by facts that indicate a "realistic likelihood" of vindictiveness. If established, the government then must show objective evidence justifying the prosecution. If the government provides such evidence, respondent must show that the evidence is pretextual and that actual vindictiveness occurred. If the government does not provide such evidence, then vindictive prosecution must be found. *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 940 (1988).

810 F.2d 1242, 1249 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 940 (1988).

National's claim of vindictive prosecution is based on a number of factors. First among them is its claim that officials both in the Charleston, West Virginia and Columbus, Ohio offices either testified, stated in depositions, or told witnesses that National was a "bad actor" and that OSHA would "play hardball" with National and was going to "get them." National also claims that OSHA's Columbus Area Office withdrew all citations and proposed penalties in Docket No. 92-2085 after National discovered through the compliance officer's deposition that the agency allegedly had an improper motivation for pursuing the inspection.[7] National also relies on its request for a warrant in Docket Nos. 93-0512, 93-0513, 93-0582 and 93-0583, which the OSHA Charleston, West Virginia office issued in connection with an inspection of a worksite of National and its subsidiary, Tri-State Construction Company, in Goldtown, West Virginia.[8] National also points to OSHA's maintenance of a

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[7] National claims that at the deposition, the compliance officer admitted that he had been told by his superiors that National was a "bad actor" and that he was told to "get them."

[8] On review, National at first suggests that the Secretary withdrew the Goldtown citations against it and its subsidiary Tri State Construction Company because of what discovery revealed about OSHA's alleged improper motives. It later modified this assertion to the question, "[w]ere these citations and proposed penalties withdrawn because of a discovery dispute, or because the Secretary did not want additional facts of her vindictiveness coming to the surface?"

computerized history database that "listed National Engineering as having violated multiple standards and as having been assessed multiple penalties when, in fact, various citations had been withdrawn by the Secretary or otherwise vacated by the Commission." It notes that the Cincinnati Area Office had a printout from this database showing an erroneous history of National's violations of the Act and penalties which it paid and that it was included in the file reviewed by Cincinnati Area Director William Murphy. National also relies on the quick issuance of the citations in this case, eight days after the investigation was started, on the testimony from the compliance officer that felt he was under pressure to get the citations out, and on the hand-delivery of the citations.

We conclude that National has failed to make the threshold showing required to establish vindictive prosecution. Although National appears to receive a good deal of attention from OSHA, it has not identified any protected right it exercised that caused the Secretary to initiate this inspection or prosecution, or to cite the violation before us as willful. National fails to show that the Secretary's request for a warrant during the 1992 inspection in Goldtown, West Virginia, has any connection to this case. "The mere fact that this prosecution followed the exercise of certain procedural rights in other, unrelated cases is insufficient to raise the appearance of vindictiveness." *United States v. Robison*, 644 F.2d 1270 (9th Cir. 1981). National's prior history of challenging OSHA's inspections and citations does not alone grant it immunity from being cited by OSHA. *Cf. United States v. Adams*, 870 F.2d 1140, 1145 (6th Cir. 1989) ("the mere filing of a lawsuit against an agency of the federal government does not give anyone a license to break the law

and insist that any ensuing prosecution be quashed as retaliatory"). The alleged statements and actions by OSHA representatives that National claims demonstrate the Secretary's animus to it, even if true, are insufficient by themselves to support a finding of vindictive prosecution. In addition to evidence of animus or retaliatory motive, National must produce evidence tending to show that it would not have been cited absent that motive.[9] *See United States v. Benson*, 941 F.2d 598, 612 (7th Cir. 1991) (prosecutor's calling defendant a "common criminal" is not enough to require further discovery concerning vindictive prosecution; "[a]lso undercutting any claim that the prosecution resulted from [the prosecutor's] pique is the fact that Benson has not shown that it is unusual for the government to prosecute people who avoid paying taxes on over $100,000"). While it is possible to raise a legitimate question of vindictive prosecution based on the exercise of a protected right in another litigation, vindictive prosecution will not be presumed if the prosecution would have taken place regardless of the exercise of a protected right in the other litigation. *See United States v. Adams*, 870 F.2d 1140, 1146 (6th Cir. 1989) (case remanded for discovery on "narrow issue of whether the EEOC, acting on an improper motive, induced the Department of Justice to

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[9] National also claims that the Cincinnati area director wanted "to blacken National Engineering in the eyes of the public." It cites to a videotape of a local Cincinnati television broadcast of the National Engineering accident where the area director is interviewed about National's conduct and the area director refers to what National calls the "false history" of its past violations and provides the interviewer with that information. However, this alleged animus, with nothing more, is insufficient to prove a vindictive prosecution.

institute a prosecution that would not otherwise have been undertaken").

Even if we were to assume that National had shown that an exercise of a protected right preceded the inspection, or that the proffered facts present a "realistic likelihood" of vindictiveness, *see Meyer*, we find no basis to conclude that the Secretary's prosecution of National in this case was unreasonable. OSHA's decision to prosecute here appears to be based upon the normal factors ordinarily considered in determining what course to pursue. *See United States v. DeMichael*, 692 F.2d 1059, 1062 (7th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983); *see also United States v. Schoolcraft*, 879 F.2d 64, 67 (3d Cir. 1989), *cert. denied*, 493 U.S. 995 (1989) (no vindictive prosecution when prosecutor's decision to prosecute is based on usual determinative factors). The OSHA inspection in this case was conducted as a result of a fatality that occurred at National's worksite. The willful designation and the proposed penalty were based reasonably on evidence OSHA developed from its investigation. We find no evidence of influence from external factors.[10]

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[10] The reasons Compliance Officer Collier gave at the hearing for why he and his supervisor, James Washam, recommended a willful violation were as follows:

> We felt the employer knew of the existence of the hazard through warnings on the crane, warnings on the operating manual, warnings in their Spotlight on Safety program, the Company's awareness of OSHA standards and ANSI standards. Also the operator's concern. The

III. Citation 2, Item 1

A.

In willful citation 2, item 1, the Secretary alleged that National violated 29 C.F.R. §1926.550(b)(2)[11] and, in the

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> operator had to our knowledge expressed a concern over using this piece of equipment because he had a concern about its stability. He didn't feel that it was a stable piece of equipment to be used this way.

The Secretary cites to a passage in the "Spotlight on Safety" employee handbook that both management and employees received at least since 1993 that states on p. 11 under the heading "CRANES - HOISTS - ELEVATORS - CONVEYORS" as follows: "2. Outriggers must be fully extended before lifting with cranes or hoists." However, the record shows that with some equipment other than the boom truck, such as the Grove crane, outriggers do not need to be employed to perform some lifts.

> [11] The standard provides:
> **§1926.550 Cranes and derricks.**
> . . . . .
> (b) *Crawler, locomotive, and truck cranes.*
> . . . . .
> (2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes . . . .

Section 5-3.2.3 of ANSI B30.5-1968 provides:

> i. Outriggers shall be used when the load to be handled at

alternative, 29 C.F.R. §1926.550(a)(1)[12] for using the boom truck "to lift concrete barriers on the site without the outriggers and stabilizers extended and set as specified by the manufacturer." The judge affirmed a serious violation of section 1926.550(b)(2) and did not discuss the alternate pleading. National first argues that the judge erred in reducing the classification from willful to serious because the standard the judge relied on, 29 C.F.R. §1926.550(b)(2), which cites to ANSI B30.5-1968, is inapplicable to the cited boom truck so that "there could be no violation, willful or otherwise."[13] National acknowledges that this argument was

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that particular radius exceeds the rated load without outriggers as given by the manufacturer for that crane.

[12] The standard provides:

§1926.550 Cranes and derricks.

(a) *General requirements.* (1) The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks. . . .

[13] Section 5-0.1 of ANSI B30.5-1968 describes the scope of ANSI B30.5-1968 as follows:

> Volume B30.5 applies to . . . cranes . . . which are basically powered by internal combustion engines or electric motors and which utilize drums and ropes . . . *Supplements covering full hydraulic cranes and side boom cranes will be developed at a later date.*

(emphasis added). National claims that "[h]ydraulic boom trucks, like the Manitex 2284 [the crane at issue], were only first developed in the 1970's" and "were not even in existence at the time that ANSI B30.5 was approved in 1968." It asserts that ANSI

not presented before the judge.[14] Under Commission Rule 92(c), 29 C.F.R. §2200.92(c),[15] we do not normally review

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B30.5-1982, approved in 1982, would include the cited boom truck because that ANSI standard no longer excludes hydraulic cranes from its coverage.

[14] National acknowledges that this issue was not briefed below but it argues that nevertheless the Commission should address this issue, citing to F.R.C.P. 12(h)(3) and *Van Dunser v. Aronoff*, 915 F.2d 1071, 1074 (6th Cir. 1990). However, these cites only require that federal courts permit any party to challenge the existence of subject-matter jurisdiction at any time in the proceedings. The issue of whether the Secretary established that the cited standard applies is not related to the Commission's having subject-matter jurisdiction in this case. National claims that it "expressly preserved the issue in its First Defense that the Secretary failed to state a claim for relief under the standard." National's "First Defense" in its answer only states that "[t]he Complaint fails to state a claim upon which relief may be granted." It is unclear how the vague "First Defense" could have "expressly preserved" this issue.

[15] Commission Rule 92(c), 29 C.F.R. 2200.92(c), provides:

> **§2200.92 Review by the Commission**.
>
> . . . . .
>
> (c) *Issues not raised before Judge*. the Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon. In exercising discretion to review issues that the Judge did not have the opportunity to pass upon, the Commission may consider such factors as whether there was good cause for not raising the issue before the Judge, the degree to which the issue is factual, the degree to which proceedings will be disrupted or

an issue if it was not argued before the judge and the opposing party did not have the opportunity to litigate it. *See, e.g., Trico Technologies Corp.*, 17 BNA OSHC 1497, 1503-04, 1996 CCH OSHC¶31,009, pp. 43,224-5 (No. 91-0110, 1996); *Seyforth Roofing Co.*, 16 BNA OSHC 2031, 2033, 1993-95 CCH OSHD ¶30,599, 0. 42,380 (No. 90-0086, 1994); *Peavey Co.*, 16 BNA OSHC 2022, 2025 n.6, 1993-95 CCH OSHD ¶30,572, p.42,323 n.6 (No. 89-2836, 1994).

Here, however, the standard the Secretary cited in the alternative also requires National's compliance with the manufacturer's specifications, but does not exclude "full hydraulic cranes" from its scope.[16] National has known of the alternative standard since the original citation, and did not object to the evidence presented by the Secretary to prove a violation of both standards. On review, National does not dispute that its operation of the boom truck did not comply with the manufacturer's specifications as shown by the operator's manual. Accordingly, because the citation alleged a violation of section 1926.550(a)(1), which clearly applies to the cited boom truck, we need not address the applicability of section 1926.550(b)(2).

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delayed by raising the issue on review, whether the ability of an adverse party to press a claim or defense would be impaired, and whether considering the new issue would avoid injustice or ensure that judgment will be rendered in accordance with the law and facts.

[16] Because we find that the alternate pleading is more applicable, we do not reach the issue of whether section 1926.550(b)(2) covers the cited boom truck.

B.

A willful violation is one which is committed with "intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Conie Construction, Inc.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶30,474, p.42,089 (No. 92-0264, 1994), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995). "It is differentiated from other types of violations by a 'heightened awareness — of the illegality of the conduct or conditions — and by a state of mind — conscious disregard or plain indifference.'" *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991 CCH OSHD ¶29,240, p. 39,168 (No. 82-630, 1991) (consolidated).

The critical provision that National failed to comply with is the clear command in the manufacturer's manual to have all outriggers and stabilizers fully deployed whenever the boom is used. The manufacturer's operating manual prohibits operation of the boom with the truck's outriggers retracted and requires that the stabilizers be fully extended prior to operating the boom.[17] In addition, there are two separate

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[17] The operating manual for the boom truck specifically requires as follows:

> - For 2200 Series, fully extend stabilizer boxes. Do not operate with boxes partially extended.
>
> . . . . .
>
> **Setting the Outriggers and Stabilizers**
>
> 1. All crane operations shall be performed with the outriggers and the stabilizers extended on a firm foundation so the crane is level.

warnings posted on the truck itself.[18]

> On the 2200 Series, the stabilizer boxes shall be fully extended.
> **Crane operations with outriggers or stabilizers retracted is prohibited**.
> (emphasis original)
>
> . . . . .
>
> **DANGER: Exceeding jib ratings or failing to comply with jib operating conditions and restrictions given on Capacity Chart will result in structural damage to crane components, collapse of crane, or tipping.**
>
> **Read all instructions on Capacity Chart before handling any load with jib.**
>
> **Do not attempt to erect jib until outriggers and stabilizers are properly set. Do not retract outriggers and stabilizers until jib is restored and boom is lowered onto boom rest**.

[18] One posted warning stated:

DANGER

YOU MUST NOT OPERATE THIS CRANE UNLESS:

. . . . .

2. YOU KNOW AND FOLLOW THE SAFETY AND OPERATING RECOMMENDATIONS CONTAINED IN THE MANUFACTURER'S MANUALS, YOUR EMPLOYER'S WORK RULES AND APPLICABLE GOVERNMENTAL REGULATIONS.

The other posted warning stated:

CAUTION

. . . . .

DO NOT USE THIS EQUIPMENT EXCEPT ON SOLID, LEVEL

In finding the violation to be serious and not willful, Judge Brady concluded that the ANSI standard referred to by the standard "does not mandate that outriggers be used for every lift, only that they be used 'when the load to be handled at that particular radius exceeds the rated load without outriggers as given by the manufacturer for that crane." We find that the judge erred because the manufacturer prohibits any lifts by the cited crane without outriggers and stabilizers extended. National's Night Superintendent Andrew Seeger acknowledged that the boom truck did not have a load chart for its operation without outriggers and stabilizers extended, and that the only lift chart it had was for when the outriggers and stabilizers were extended. Therefore, any use of the boom truck without all the outriggers extended would "exceed the rated load" for the crane. Not only did Foster attempt to lift without all the outriggers extended, he made lifts on several occasions without *any* of the outriggers extended.

Based on our review of the record, we conclude that the Secretary has established that National was plainly indifferent to employee safety.[19] Despite the prohibitions in

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SURFACE WITH OUTRIGGERS PROPERLY EXTENDED BEFORE OPERATING THIS CRANE, REFER TO MAXIMUM LOAD (CAPACITY) CHART ON CRANE FOR OPERATING (LOAD) LIMITATIONS.

[19] The Secretary claims that "[t]he OSHA regulations and the incorporated ANSI standard were known to [National] as a corporate entity both because the Ohio Department of Transportation contract for the I-71 project stipulated that the

the manual and warnings posted on the crane explicitly requiring that the outriggers be extended prior to using the boom, National's policy was to perform lifts regardless of whether the outriggers or stabilizers could be extended.[20] Crane Operator Foster himself had previously set the concrete barriers off the side of the truck in the same manner that caused the accident, with the boom truck's front outriggers in and the back stabilizers down but not extended, "four or five other times on that project."[21] Foster testified that Foreman

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contractor must comply with OSHA regulations." We do not find that this is enough to support a conscious disregard of sections 1926.550(b)(2) or (a)(1), and the record does not show that National actually knew of the cited standards.

[20] Compliance officer Collier summarized National's policy as follows:

> The policy as related to me by Mr. Seeger and Mr. Ruf was that they use all the outriggers and stabilizers fully extended to set when they can, but when there is a physical barrier, when there is a problem for one reason or another [,] if there is [a] problem and they cannot do it, then they set or use them as they can with as many as they can use that aren't obstructed.

[21] Although National claims that "[o]n no occasion, however, did Mr. Foster or any other operator make a pick in the manner Mr. Foster did the night of the accident; i.e., make a pick from the side of the boom truck where the outrigger supporting that side had been retracted," the testimony shows otherwise:

Q. I had previously asked you if you had ever operated a boom truck this way before, and you indicated that there were four or five times?

Ruf was present at those times,[22] and Foster was never told by anyone in National's management not to operate the boom truck in that manner. Night Superintendent Seeger testified that they would use the boom truck on "more than two or three" occasions in locations where it was not possible to put down the front outriggers and the back stabilizers in moving concrete barriers with a boom truck. Foreman Ruf also testified that they would use the outriggers and stabilizers if

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A. Yes.

Q. Now, you were referring to the boom truck that you operated that night; were you not?

A. Yes, ma'am. As well as --

Q. And that was in moving concrete traffic barriers?

A. Yes, ma'am.

Q. And was that in setting barriers over the side of the truck?

A. Yes, ma'am.

[22] Foster's testimony is unrebutted. Foreman Ruf testified as follows:

Q. Now, have you ever seen an operator prior to August 16, 1994, make a pick without the outrigger out on the side he was making the pick from?

A. Do you mean on the load side?

Q. Yes, on the load side.

A. It's possible I can't think of any one that comes to mind.

Q. But you have seen that?

A. No, I'm not saying that. I'm saying it's possible. We have picked off the rear before.

possible.[23] Both Ruf and employee William Sanders testified that in situations where there was not enough room, the boom was used without the front outriggers and rear stabilizers fully extended. Crane Operator Foster testified that the normal procedure was to fully extend the outriggers and stabilizers "when you have room." National's Safety Director William Bunner testifed that the boom truck's operation manual does not need to be followed because the manufacturer's requirement stated in the Manitex operator's manual is only a "general limitation." Bunner claimed that "[t]he manufacturer's operation manual does not speak to each even that normally occurs on a construction project, nor does it address all the acceptable safety practices that may be used that experts have identified for years." However, National did not introduce evidence to show that "experts" would agree that the cited boom truck could ever be used without the outriggers and stabilizers extended.[24] The Secretary's expert

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[23] Ruf testified as follows:

Q. All right, now, at what times in moving the concrete barriers were the front outriggers and/or the back stabilizers not fully extended? What situations was that condition present?

A. If we have live traffic on one side and an obstruction like a barrier wall or something like that to keep it from coming down the other side, but the back ones are always down.

Q. But not necessarily fully extended?

A. No, not necessarily.

[24] Other pieces of equipment at the site, such as the Grove crane, had lift charts that permitted them under certain circumstances to perform lifts without using their outriggers.

witness, mobile crane instructor Donald Frantz, testified that the boom truck's manufacturer's specifications are that lifts can be performed only with the outriggers fully deployed and the stabilizers extended and down. The record demonstrates that had the truck been moved forward 10 feet, the concrete barrier could have been put in place with the truck's outriggers and stabilizers fully extended. We can only conclude that National's failure to comply establishes plain indifference. *See Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1123, 1993-95 CCH OSHD ¶30,048, pp. 41,280-81 (No. 88-572, 1993) (willfulness can be established by a showing that "an employer harbored a 'state of mind . . . such that, if he were informed of the [applicable standard], he would not care'"), *citing Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987). *See also Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1257-8, 1986-87 CCH OSHD ¶27,893, p. 36,590 (No. 85-355, 1987) (owner's continued preference for violative practice instead of what the standard requires shows indifference).

However, the cited boom truck only had a lift chart for performing lifts with the outriggers and stabilizers extended. Bunner noted that National had in February, 1995 a seminar on cranes covering "rule of thumb applications to operations," where the instructor allegedly stated that the use of cranes without all outriggers down as long as they are down on the "strong side of the rig" is acceptable. However, there is no evidence that the seminar addressed the use of boom trucks, where the manufacturer requires all outriggers and stabilizers fully extended, as opposed to such devices as the Grove crane, which in some circumstances permits lifts to be conducted without outriggers down.

IV. Penalty

Having found the violation to be willful, we must now assess a penalty. The Secretary proposed a penalty of $70,000. Although National was advised in the Briefing Notice "That when the merits or characterization of an item are before the Commission for review, the appropriateness of the penalty also is subject to review," it did not address the proposed penalty amount on review. In assessing penalties, the Commission gives due consideration to the size of the employer's business, the gravity of the violation, the employer's good faith, and his history of previous violations. Section 17(j) of the Act, 29 U.S.C. §666(j). These factors are not necessarily accorded equal weight. Generally, gravity is the principal factor in assessing a penalty. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483, 1993-93 CCH OSHD ¶29,582, p. 40,03 (No. 88-2691, 1992). The gravity of a violation depends on such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶29,946, p. 41,033 (No. 87-2059, 1993). The gravity here is severe because the violation directly resulted in the death of one employee and the serious injury to another. At least four other employees were working around the boom truck when it flipped to its side, and were exposed to the hazard as the barriers were being placed. National did not take any precautions against injury. National's disregard for the safety of its employees entitles it to no credit for good faith. National operated the boom truck without regard for whether or not the outriggers should be extended despite warnings against such operations posted on the truck itself. National is a large employer, with 456 employees, and

National has a history of violations.[25] In our view, none of the 17(j) factors would support mitigating the penalty and accordingly we assess the maximum penalty of $70,000.

V. Order

We affirm citation 2, item 1 as a willful violation of 29 C.F.R. §1926.550(a)(1) and assess a penalty of $70,000.

/s/_____
Stuart E. Weisberg
Chairman

/s/_____
Daniel Guttman
Commissioner

Dated: September 30, 1997

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[25] As part of its proffer for its vindictive prosecution defense, National submitted a computer printout which allegedly contained numerous erroneous entries. However, National does not dispute that some of the entries are valid.

APPENDIX C

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

[Filed: February 21, 1996]

OSHRC Docket No. 94-2787

SECRETARY OF LABOR, *Complainant*,	)
v.	)
NATIONAL ENGINEERING & CONTRACTING COMPANY, *Respondent*,	)
L.I.U. OF N.A., LOCAL 265, I.U.O.E., LOCAL 18, *Authorized Employee Representatives*.	)

DECISION AND ORDER

National Engineering & Contracting Company (National Engineering) contests two citations issued by the Secretary on August 25, 1994. The Secretary issued the citations following an inspection conducted by Occupational

Safety and Health Administration (OSHA) compliance officer John Collier. Collier's inspection took place at National Engineering's worksite along Interstate 71 in Madeira, Ohio. National Engineering employee Lloyd Lee had been killed when a boom truck overturned on him on August 16, 1994, prompting the OSHA inspection.

National Engineering is a construction company whose headquarters are in Strongville, Ohio. It was the general contractor under a contract with Ohio Department of Transportation (ODOT) for a project in which a sound wall barrier would be constructed along six miles of I-71 near Cincinnati, Ohio (Exh. C-2, Tr. 20, 26-27). Sound barriers as high as 24 feet were placed between the highway and the neighborhood houses (Tr. 118-119).

Motion to Reconsider

At the hearing the undersigned denied National Engineering's attempt to introduce evidence relating to vindictive prosecution by the Secretary. In its brief, National Engineering moved the court to reconsider this ruling. National Engineering's motion is hereby denied.

Citation No. 1

Item 1: Alleged Serious Violation of §1926.95(a)

Section 1926.95(a) provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory

> devices, and protective shields and barriers, shall be provided, used and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The ODOT permitted National Engineering to close one land of traffic in order to erect the sound barriers. National Engineering used various traffic control devices to close the lane, including signs, arrow boards, blinking lights, a truck with a flashing light, and orange construction barrels (Tr. 45-47). Employees were required to wear reflectorized orange vests while placing the barrels on the highway (Tr. 50). Andrew Seeger, National Engineering's night superintendent, testified that once his crew was no longer on the highway, he did not require them to wear the vests (Tr. 121-122):

> Seeger: There are two situations; setting them on the road and setting them off the road. Off the road, you didn't have to wear the vest; on the road, you have to wear the vest. That is the rule that is followed.
>
> Q: Can you differentiate by using as an example what was going on the night of this accident? Were the barriers being put off the road or on the road?

Seeger: They were not being put on the main line road.

Q: They were being put on the berm area; is that right?

Seeger: The berm area of the ramp.

Q: Under the circumstances that night, once the barrels had been put out, was it necessary for the crew to wear vests when they were putting out the concrete barrier?

Seeger: We were setting them off the road. We had traffic control set up. We were setting pretty much off the road, and we didn't really have to deal with traffic. We didn't have to deal with live traffic any more until the traffic control had to be taken back down later in the night.

The Secretary has the burden of proving the violation.

In order to prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) the employees had access to the violative conditions; and (4) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence.

Armstrong Steel Erectors, Inc., 17 BNA OSHC 1385, 1386 (No. 92-262, 1995).

National Engineering states that §1926.95(a) does not apply to work done on or near interstate highways. The company contends that it was required only to comply with §§1926.200, 201, and 202 of subpart G. Subpart G is entitled "Signs, Signals, and Barricades." It deals with the use of traffic control devices. Section 1926.95(a) is contained in subpart E, "Personal Protective and Life Saving Equipment." No reason is given why §1926.95(a), which is part of OSHA's construction standards, does not apply to the construction work in which National Engineering was engaged on the I-71 project. While National Engineering is subject to the requirements of the standards contained in subpart G, this in no way exempts it from complying with the requirements found in subpart E. National Engineering's argument is rejected.

National Engineering also questions whether reflectorized vests fit the definition of personal protective equipment. The vests offer no physical barrier to injury, but only highlight the employees' presence. This argument too is rejected.

The pertinent language of §1926.95(a) provides: "Protective equipment, including . . . protective clothing . . . shall be . . . used . . . wherever it is necessary by reason of hazards of . . . environments, encountered in a manner capable of causing injury . . . in the function of any part of the body through . . . physical contact." The wording of the standard is sufficiently broad to encompass reflectorized vests. While the vests do not protect actual guarding against

physical contact, they provide a visual warning to operators of vehicles who might otherwise not see the employees. The vests are protective in the sense that they help prevent employees from being struck by oncoming vehicles. Section 1926.95(a) applies to the cited conditions in the present case.

By Seeger's own admission, he did not require his crew to wear reflectorized vests while they were erecting the concrete sound barriers in the berm areas. The Secretary charges that this failure to wear the vests constitutes a violation of the terms of §1926.95(a). National Engineering argues that its crew's failure to wear vests does not violate the terms of the standard because the wearing of vests was not made "necessary by reason of hazards of . . . environments, encountered in a manner capable of causing injury." It is contended that the environment in which the crew was working, *i.e.*, the berm area of the construction site, did not present a hazard capable of causing injury.

Compliance officer Collier testified regarding the hazard presented by the National Engineering crew's failure to wear reflectorized vests (Tr. 499):

> Q.: Did you still consider [it a] hazard even with the barrels placed there?
>
> Collier: Yes.
>
> Q.: Why?
>
> Collier: First of all, barrels don't stop traffic from coming through. They are more of a warning than an actual deterrent as a concrete

> barrier. Employees were exposed between the boom truck and the barrel area on the traffic side during the operation as well.

Collier's reasoning provides little support for the Secretary's position. The barrels are not "an actual deterrent" to traffic, but then neither is a reflectorized vest. The barrels serve as a visual warning, which is the purpose that the vests serve. As far as highway traffic goes, the barrels make the vests redundant. If a motorist is not deterred by a series of orange barrels, he or she will likely not be deterred by the sight of a vest.

Collier also cites the employees' proximity to the boom truck as a hazard requiring the wearing of the vests. Collier conceded, however, that if the boom truck was in National Engineering's yard and employees were working in the same proximity to the truck, they would not be required to wear the vests (Tr. 583).

The Secretary has failed to establish that National Engineering was in noncompliance with the terms of §1926.95(a). A motorist who cannot control an automobile well enough to avoid hitting orange barrels would not be able to stop for a reflectorized vest. The hazard cited by the Secretary is reduced by the presence of the traffic control devices. Once these devices are placed between the traffic and the employees, the vests are unnecessary.

Item 3: Alleged Serious Violation of §1926.251(a)(4)

The Secretary alleges that National Engineering violated §1926.95(a), which provides:

> Special custom design grabs, hooks, clamps, or other lifting accessories, for such units as modular panels, prefabricated structures and similar materials, shall be marked to indicate the safe working loads and shall be proof-tested prior to use to 125 percent of their rated load.

National Engineering used a specially designed lifting bracket to lift the concrete sound barriers (Exhs. C-25, C-26; Tr. 107). The safe working load of the bracket was not marked on the bracket (Tr. 495-496, 503). The Secretary has established a violation of the standard.

The Secretary alleges that National Engineering's violation of §1926.251(a)(4) was serious. Section 17(k) of the Occupational Safety and Health Act of 1970 (Act) provides that a violation is serious if there is a substantial probability that death or serious physical harm could result from the violation. Collier explained the hazard of using a lifting bracket whose lifting capacity was not marked (Tr. 503):

> No one there [at National Engineering] knew, particularly the operator knew what its capacity was, what it could safely lift. If you would lift more than what it was load rate tested at or what its safe capacity is, the potential to break it or for it to fail on the road and drop, in this case one of the concrete barriers, existed.

Estimates of the weight of the concrete barriers ranged from 3,700 pounds to 2 tons (Tr. 503). Any employee

located nearby a dropped barrier would likely suffer serious injuries. Any employee located underneath a dropped barrier would be killed (Tr. 504). The Secretary has established a serious violation of §1926.251(a)(4).

Item 4: Alleged Serious Violation of §1926.550(b)(2), or, Alternatively, of §1926.550(a)(5)

The Secretary alleges a serious violation of §1926.550(b)(2), which provides[1]:

> (2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes. However, the written, dated, and signed inspection reports and records of the monthly inspection of critical items prescribed in section 5-2.1.5 of the ANSI B30.5-196 standard are not required. Instead, the employer shall prepare a certification record which includes the date the crane items were inspected; the signature of

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[1] In the alternative, the Secretary alleges a serious violation of §1926.550(a)(5), which provides:

> (5) The employer shall designate a competent person who shall inspect all machinery and equipment prior to each use, and during use, to make sure it is in safe operating condition. Any deficiencies shall be repaired, or defective parts replaced, before continued use.

> the person who inspected the crane items; and a serial number, or other identifier, for the crane inspected. The most recent certification record shall be maintained on file until a new one is prepared.

Section 5-1.9.3(d) of ANSI B30.5-1968 provides (Exh. C-42): "Means shall be provided for securely fastening outrigger floats to outriggers when in use."

The outrigger floats (also known as stabilizer pads) were broken off of the rear stabilizers of the boom truck. Pete Lung, National Engineering's day shift operator, reported the left rear stabilizer pad broken on July 29, 1994 (Exh. C-10; Tr. 80-83). Seeger and National Engineering foreman Darrell Ruf both acknowledged that they knew the floats were broken (Tr. 83, 171). National Engineering replaced the broken floats with steel plates (Tr. 628).

National Engineering contends that the steel plates performed the same job as the original floats, that is, keeping the boom truck stable. It argues that the steel plates were an adequate substitute for the floats.

Collier disputed National Engineering's contention that the steel plates were acceptable replacements for the floats. The steel plates were "not fastened. [The floats] were broken and these could not be fastened to the outriggers which is required" (Tr. 630). Collier explained that while the outrigger lies flat, the boom truck is stabilized, but "if it should lift, then the potential exists that it's not going to come back down in the same place. In fact, that happens. It either isn't going to set back down squarely or it can miss entirely

if you lift one side and that's part of the function" (Tr. 631). Mark Foster, the crane operator the night of the accident, stated that he knew using the boom truck with the broken floats was unsafe (Tr. 441).

The Secretary has established a violation of §1926.550(b)(2). The Secretary alleges that the hazard was serious. Collier stated that the hazard to employees was their exposure "to potentially being struck by the crane should it tip over" (Tr. 509). This would likely result in serious physical injuries or death. The violation is serious.

Item 5: Alleged Serious Violation of §1926.550(b)(2), or, Alternatively, of §1926.550(a)(5)

The Secretary charges National Engineering with a serious violation of §1926.550(b)(2), or, alternatively, of §1926.550(a)(5). These are the same standard sections at issue in item 4. Section 1926.550(b)(2) incorporates ANSI B30.5-1968, section 5-2.3.3(d), which provides: "All replacement parts or repairs shall have at least the original safety factor." The Secretary alleges that National Engineering used parts not having the original safety factor in two instances: (1) the safety latch on the load hook of the Manitex Model 2284 boom truck was held in place with a bent nail (Exh. C-30); and (2) the damaged boom tip on the boom truck was repaired with a carriage bolt (Exh. C-32).

Collier explained the hazard created by using the bent nail to hold the safety latch in place (Tr. 512-513): "Should the safety latch come off or not be there should the nail fall out, the slings that are in or a slung load being the lifting fixture in this case can potentially slip out of the hook and

strike the employees." The hazard created by the use of the carriage bolt to repair the damaged boom tip was that "[b]eing a threaded bolt like this, the potential for the load line to contact it, threads can act like saw teeth as opposed to a smooth piece of metal which is routinely used as a rope keeper up at the boom tip (Tr. 514).

The Secretary did not present evidence of the safety factors of either the original parts or of the their replacements. Collier admitted that he did not know the safety factor of the original rope keeper or its replacement carriage bolt (Tr. 640). Collier also conceded that he did not know the safety factor of the original cotter pin or the replacement bent nail (Tr. 634-635). The safety factors of the original part and its replacement are crucial to the Secretary's case. Without evidence of the safety factors, the Secretary cannot prove its a violation of §1926.550(b)(2).

In the alternative, the Secretary alleges that National Engineering violated 11926.550(a)(5), which provides:

> (5) The employer shall designate a competent person who shall inspect all machinery and equipment prior to each use, and during use, to make sure it is in safe operating condition. Any deficiencies shall be repaired, or defective parts replaced, before continued use.

Foreman Ruf placed the carriage bolt through the top of the boom tip and put the bent nail in to hold the safety latch in place (Tr. 172-173). Ruf had over 20 years experience at National Engineering (Tr. 643). The Secretary failed to show that Ruf was not a competent person under the terms of the

standard. The defective parts at issue were replaced. The Secretary has failed to establish a violation of §1926.550(a)(5).

Citation No. 2
Item 1: Alleged Willful Violation of §1926.550(b)(2), or, Alternatively, of §1926.550(a)(1)

The Secretary alleges that National Engineering willfully violated §1926.550(b)(2), or, in the alternative §1926.550(a)(1). Section 1926.550(b)(2) incorporates ANSI B30.5-1968, section 5-3.2.3(I), which provides:

> Outriggers shall be used when the load to be handled at that particular radius exceeds the rated load without outriggers as given by the manufacturer for that crane. Where floats are used they shall be securely attached to the outriggers. Wood blocks used to support outriggers shall:
>
> 1. Be strong enough to prevent crushing.
> 2. Be free from defects.
> 3. Be of sufficient width and length to prevent shifting or toppling under load.

At the time of the accident, on the evening of August 16, 1994, neither of the boom truck's front outriggers were deployed and the back stabilizers were down but not fully extended (Tr. 389-394; 420-421). National Engineering's crane operator, Mark Foster, had operated the crane without all of its outriggers extended four or five other times on the I-71 project, in foreman Ruf's presence (Tr.

421). Night superintendent Andrew Seeger stated that there were times when all four outriggers were not deployed because there was not enough space to extend the outriggers and stabilizers (Tr. 72).

The Secretary and National Engineering agree that the boom truck rolled over because the right front outrigger was retracted when Foster attempted to pick the load off the same side. National Engineering does not dispute that the load exceeded the crane's rated load without outriggers and that all the outriggers should have been extended. The Secretary has established a violation of §1926.550(b)(2).

National Engineering contends, however, that the violation resulted from Mark Foster's unpreventable employee misconduct. To establish the affirmative defense of unpreventable employee misconduct, the employer must prove: (1) that it has established work rules designed to prevent the violation; (2) that it adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

Despite Foster's testimony that he had made lifts four or five times without the outriggers fully extended, National Engineering argues that those lifts occurred under special circumstances not present the night of August 16, 1994. the record shows that there were times when the pick was made by equipment that used a "rubber" chart. In those instances, National Engineering did not need to use the outriggers.

There were other times when, because of physical restrictions, outriggers could only be partially used when the pick was made (Tr. 127-128, 162, 168-169, 171). On those occasions, there was only 11 feet of room between the concrete barrier on one side and the sound wall on the other side (Tr. 127-128). A truck would back into the area and, at that point, the boom was physically restricted from going to the left or to the right because of the two barriers. The boom had to stay within the plane of the bed of the truck, operating over its back (Tr. 128-129). The outriggers were not fully deployed if it was impossible to extend them because of the physical limitation (Tr. 63, 72, 76). National Engineering claims that using the crane in this manner is consistent with accepted industry safety practices.

The Secretary disputes this claim. His crane expert, Donald Frantz, testified that the manufacturer's specifications for the 2200 Series Manitex boom truck required that all outriggers be fully deployed when making lifts with the boom truck (Tr. 735). Frantz made no exceptions for making lifts in restricted circumstances.

National Engineering can point to no work rule which states that making lifts without having all outriggers extended is permissible in some circumstances but not in others. In fact, Foster testified that he was never told by management not to operate the boom truck without all the outriggers and stabilizers down and fully extended. Foster stated that there were times when Seeger and Rug would question why Foster would not run the crane with the outriggers in (Tr. 422). National Engineering has failed to show what work rule Foster violated when he attempted the lift without the outriggers extended. National Engineering permitted lifts to

be made with the outriggers undeployed. It cannot now claim that Foster engaged in unpreventable employee conduct when such a lift resulted in a fatality. National Engineering has failed to establish its affirmative defense.

The Secretary alleges that National Engineering's violation of §1926.550(b)(2) was willful.

> A violation is willful if committed with intentional, knowing, or voluntary disregard for the requirements of the Act of with plain indifference to employee safety. . . . A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. . . . A willful charge is not justified if an employer made a good faith effort to comply with a standard even though the employer's efforts are not entirely effective or complete.

Valdak Corp., 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995).

Collier explained why the violation was charged as willful (Tr. 526):

> There were a number of reasons. We felt the employer knew of the existence of the hazard through warnings on the crane, warnings on the operating manuals, warnings in their Spotlight on Safety program, the Company's awareness of OSHA standards and ANSI

standards.

> Also the operator's concern. The operator had to our knowledge expressed a concern over using this piece of equipment because he had a concern about its stability. He didn't feel that it was a stable piece of equipment to be used this way. That was part of it.

Collier is referring to the testimony of Foster who had told Ruf prior to the lift that he would prefer to use a different vehicle to make the lift (Tr. 424-425). Foster also testified that there was some discussion about how to go about making the lift (Tr. 433-435):

> Q.: And you had specific discussions with your supervisors, both Mr. Ruf and Mr. Seeger about putting outriggers out on your machine, didn't you?
>
> Foster: They claimed it took too much time.
>
> Q.: But you told them that you wanted to do it, didn't you?
>
> Foster: That's right.
>
> Q.: And they told you that you had the final word on that, didn't they?
>
> Foster: Andy said that, yes.
>
> * * *

Q.: Did [Seeger] ever intimidate you?

Foster: No, he didn't. Darrell Ruf tried.

Q.: I know, but you didn't let him, did you?

Foster: He didn't want to take the time.

Q.: You didn't put up with that did you?

Foster: I did.

Q.: But you did things the way you thought were safe, didn't you?

Foster: The way Lloyd Lee and I thought were safe.

Q.: And, including this last pick that night.

Foster: Judging from what I had done with the machine before, yes.

It is a close question whether National Engineering committed a willful violation of §1926.550(b)(2). Foster chose to attempt the lift without extending all the outriggers when he could have pulled forward several feet and extended the outriggers with no problem. Foster believed that such a lift was possible "judging from what [he] had done with the machine before." It was only because of National Engineering's past practice of making lifts without all of the outriggers extended that Foster attempted the lift that resulted in the fatality. Yet the ANSI standard referenced by the Secretary does not mandate that outriggers be used for every

lift, only that they be used "when the load to be handled at that particular radius exceeds the rated load without outriggers as given by the manufacturer for that crane."

The evidence failed to show a "heightened awareness" of the illegality of making the lifts without extending all the outriggers or a conscious disregard or plain indifference to employee safety. The Secretary established a serious violation of the cited standard.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under section 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

National Engineering employed approximately 456 employees (Tr. 488). The record does not indicate any bad faith on the part of the company. National Engineering has a history of previous violations (Tr. 537).

The gravity of the violation of §1926.251(a)(1) in item 3 is high. National Engineering was using a lifting bracket whose safe working load was unknown. The appropriate penalty for this violation is $5000.00. Item 4 contains a violation of §1926.550(b)(2). The gravity of this violation is moderate. Although National Engineering did not have floats securely fastened to the outriggers, it did replace the broken

floats with steel plates that were large than the original floats. The hazard of working with broken floats was minimized. A penalty of $3000.00 is assessed.

The gravity of the violation of §1926.550(b)(2) contained in citation no. 2 is severe. National Engineering's violation of this standard directly resulted in a man's death. A penalty of $10,000.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. The citation for item 1 of citation no. 1, alleging a serious violation of §1926.95(a) is vacated, and no penalty is assessed;

2. The citation for item 3 of citation no. 1, alleging a serious violation of §1926.251(a) is affirmed, and a penalty of $5000.00 is assessed;

3. The citation for item 4 of citation no. 1, alleging a serious violation of §1926.550(b)(2) is affirmed, and a penalty of $3000.00 is assessed;

4. The citation for item 5 of citation no. 1, alleging a serious violation of §1926.550(b)(2) is vacated, and no penalty is assessed; and

5. The citation for item 1 of citation no. 2, alleging a willful violation of §1926.550(b)(2) is affirmed as serious, and a penalty of $10,000.00 is assessed.

/s/_____
PAUL L. BRADY
Judge